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In the Supreme Court of the United States

72-911

OCTOBER TERM, 1972

LESLIE S. KAPLAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Leslie S. Kaplan, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on September 8, 1972.

Opinion Below

The opinion of the Court of Appeals is presently unreported. It is reprinted as Appendix A, infra.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra) was entered on September 8, 1972. A timely Peti-

tion for Rehearing and Suggestion of Appropriateness of a Rehearing En Banc was filed. The petition for rehearing was denied on November 24, 1972. (Appendix C, infra.) The suggestion of the appropriateness of rehearing en banc was not acted upon. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review

Whether the Court of Appeals acted in a manner contrary to controlling decisions of this Court when, upon finding that the government had knowingly used perjured testimony to prove one count of a multi-count indictment, it affirmed convictions on the remaining counts without inquiry into whether the perjured testimony could reasonably have influenced the deliberations of the jury as to those counts; and whether this Court, in the exercise of its supervisory powers over federal criminal trials, will permit a conviction as to any counts of an indictment to stand, where perjured testimony is knowingly used to prove less than all the counts?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Title 18, United States Code, Section 1341, and Title 18, United States Code, Section 371, are reprinted as Appendix D, infra.

Statement of the Case

Petitioner, Leslie S. Kaplan, an Illinois physician, was indicted with ten others and charged with violations of the federal mail fraud and conspiracy statutes, 18 U.S.C. 1341 and 18 U.S.C. 371, respectively. Dr. Kaplan's trial was severed from that of his co-indictees, and following a trial by jury he was found and adjudged guilty on Counts One, Four, Seven, Ten, Twelve and Seventeen of the indictment. Following denial of his post-trial motions, including a motion for a new trial based upon newly discovered evidence of perjury by a government witness, he was sentenced to concurrent terms of three years on each count, and fined a cumulative total of $15,000.[1]

On appeal Dr. Kaplan's conviction on Count Twelve was reversed, upon a finding that the prosecution knowingly utilized perjured testimony in obtaining the conviction. Dr. Kaplan's convictions on the four remaining substantive counts of mail fraud, and his conviction on the conspiracy count, were affirmed.

The Indictment

The indictment contained fifteen substantive counts, and alleged a scheme to defraud insurance companies and self insurers by means of "false pretenses, representations and

[1] Of the original eleven co-indictees, only Dr. Kaplan and one Jessie Ward were convicted. The remaining co-indictees were either acquitted at trial, or dismissed from the indictment. Ward, who testified against Dr. Kaplan at trial, entered a plea of guilty to one count of the indictment, and was sentenced to a six month term to be served concurrently with a term he was then serving for counterfeiting. Ward was subsequently proved to have perjured himself in testifying that he had not been given a promise of consideration in exchange for his testimony. (See infra.)

promises." Count One, which was adopted by reference in the fifteen substantive counts, charged that Dr. Kaplan, along with Sid and Whit Johnson, Curtis Allen, Joe Louis Beckom, Otis Marion, George Riley, Willie Rogers, John Tabor, William Taylor, and Jessie Ward, devised a scheme whereby they planned "fake automobile and pedestrian accidents * * * [and] caused vehicles to collide with other vehicles, objects and pedestrians * * *"; that these defendants recruited persons to participate in these planned accidents; that these defendants falsely claimed that they had been victims in both legitimate and illegitimate accidents; that these defendants would cause others to claim they had been victims in these accidents; that these defendants would retain attorneys to represent them in prosecuting claims growing out of these accidents; that these defendants caused these persons to visit the offices of Dr. Kaplan, and that Dr. Kaplan prepared and caused to be prepared "medical bills and reports which * * * contained false and fraudulent pretenses and representations, in that said bills were rendered reflecting non-existing treatments, medication and visits and inflated treatments, medication, and visits, and said reports were rendered reflecting non-existent injuries, damages and treatments, and inflated injuries, damage and treatments"; that Dr. Kaplan prepared and caused to be prepared false lost wage statements in conjunction with the aforesaid accidents; and that Dr. Kaplan caused the aforesaid medical bills, reports and lost wage statements to be submitted to insurance companies and self insurers.

Dr. Kaplan was charged in five substantive counts with mailings in furtherance of the scheme, and in the conspiracy count. Count One named Dr. Kaplan, Whit Johnson, Sid Johnson, John Tabor and William Taylor as having mailed a letter in furtherance of the scheme to defraud. Count Four charged Dr. Kaplan, Joe Beckom, Whit Johnson, and John Tabor with a mailing

in furtherance of the scheme. Count Seven named Dr. Kaplan and Joe Beckom as having caused a mailing in furtherance of the scheme. In Count Ten Dr. Kaplan was named with Whit Johnson, and in Count Twelve with Joe Beckom, Whit Johnson and Jessie Ward. In Count Seventeen, the conspiracy count, Dr. Kaplan was named with all defendants.

Evidence at Trial

Testimony at trial showed that one William Kaper, a then disbarred attorney who had previously been convicted of a mail fraud unconnected with this case, and who testified against Dr. Kaplan, employed two men, Sid Johnson and Whit Johnson, as "chasers" to refer accident victims to him. Kaper, in turn, referred a number of these people to Dr. Kaplan for examination and treatment. As to each of the five substantive counts in which Dr. Kaplan was named, the government introduced evidence tending to show that Dr. Kaplan submitted false bills and reports to insurance companies and self insurers. This was the limit of Dr. Kaplan's alleged involvement in the scheme, and it was neither alleged nor proven that Dr. Kaplan planned false automobile accidents or recruited persons to participate in these accidents.

Dr. Kaplan's defense to the charges was that he prepared the medical bills and reports in good faith, and that he had no knowledge that persons treated by him were not involved in accidents as they had claimed, and did not suffer from the subjective symptoms which they described to him. During the period alleged in the indictment, Dr. Kapan's clinic treated approximately 120,000 patients, approximately 1600 of whom had been involved in accidents. Dr. Kaplan was thus unable to state how

many times he saw the patients involved in the five instances of fraud alleged in the indictment, but after examining the bills and medical reports which he submitted on these persons, he testified that each bill and report truly and accurately described his examination, treatment and diagnosis of that person.

The Government's Knowing Use of Perjured Testimony

Jessie Ward, an accomplice charged in Count Twelve and Count Seventeen, the conspiracy count, testified for the government that after one Joe Beckom had been involved in an automobile accident, he, Beckom and Whit Johnson decided to make a fraudulent claim that he, Ward, was a passenger in the car. Ward said that Whit Johnson took him and Beckom to Dr. Kaplan's clinic; that Johnson had them admitted to the rear of the clinic, where Johnson had a private conversation with Dr. Kaplan; that Johnson then told them that Dr. Kaplan "knew what was happening", and would write medical reports for them; that Dr. Kaplan examined Beckom's throat and asked him if he wanted to go into the hospital; that Dr. Kaplan told Beckom that he would put him in the hospital in order to get a good report; that Dr. Kaplan did not examine him, but merely asked him what he wanted on his report; that Dr. Kaplan did not give him any pills, ointments or injections at the time; and that he received an eye test at the direction of Whit Johnson, who told Dr. Kaplan's staff to do so because it could be added to the bill.

Ward said that about one month after this visit he, Beckom and Whit Johnson returned to the clinic to get medical reports for their lawyer, Kaper. He said that

Dr. Kaplan and Whit Johnson had another private conversation, after which Dr. Kaplan asked him and Beckom how many visits he wanted him to put on the medical report. Ward said that he told Kaplan to indicate that he had seen him four or five times, and that Dr. Kaplan complied.

At the time he testified against Dr. Kaplan, Ward was awaiting sentencing on his plea of guilty to Count Twelve of the indictment. He was also serving time in a federal penitentiary on a counterfeiting conviction, and had earlier been convicted of a Dyer Act violation. During cross examination of Ward the prosecution successfully objected to questions designed to discover if any consideration had been promised Ward to testify for the government.

From time to time however, Ward denied that he had been promised anything in return for his testimony. He said Mr. Hoffman, one of the Assistant United States Attorneys, "never, never, never" told him he would inform the court that Ward had testified for the Government when he came up for sentencing in the mail fraud case. Mr. Schiller, his own attorney "never, never" told him that. (A. 637-8) In fact, Ward said: "I don't want to talk to Mr. Potter or Mr. Hoffman, none of them. If I did, I wouldn't have went to the penitentiary. I don't want to talk to the people. • • • I don't want to see them people. • • • They're the ones that got me behind • • • the prison bars. Why should I want to come talk to him? I just want to admit my crime and go back to the street to my friends." (A. 638-9) Asked if the prosecutors could not help him, Ward replied: "Can't nobody help me. • • •" (A. 639) And again, when asked about meetings with the prosecutors: "I'm not in love with these people.

I ain't got nothing from them. * * * I am not in love with any of these peoples in here. They're not going to do nothing for me, * * *" (A. 641) And finally, when asked if he had spoken to the prosecutor the previous evening about doing something for him, Ward said: "What can he do for me? I'm in the penitentiary." (A. 646)

Not content with the answers his witness had given on cross examination the prosecutor, Mr. Hoffman, asked the following question and elicited the following answer on redirect examination:

> "Q. Mr. Ward, at any time of the few times that you and I have talked together, did I or Mr. Sprague or Mr. Potter ever made any promise of any kind to you regarding anything?
>
> "A. You people keep asking me that. I told you ain't nobody never offered me nothing, and I would like to say you made no offers, you never told me you could do anything for me. The only thing you ever told me, did I want to tell you anything about the case, and whatever I said could be used against me, and I would like to say I have told the Court what part I have played in the case on the mail fraud which the Government had me indicted, and I also would like to say again I want no part to do with you peoples. I just want to do my time and let you all let me alone." (A. 666-7)

In final argument the Assistant United State's Attorney pointed to Jessie Ward as a disinterested witness who had nothing to lose by testifying for the government, and whose testimony was therefore deserving of particular consideration by the jury. He said,

> "Now Jessie Ward, the defendants are going to tell you, lied. Jessie Ward also told you of his past criminal history, and he didn't try to hide it from

you, and I submit to you just one very simple statement on Jessie Ward: At this late date he has got nothing to gain or love." (A. 1042)

But the plain truth, contrary to Mr. Hoffman's questions on redirect, and certainly contrary to the testimony Ward gave, and most certainly known to co-prosecutor Sprague who sat in the courtroom at the time, was that Ward had been made promises by the prosecution before he testified.

On September 3, 1970, Ward wrote the following letter to his court-appointed attorney complaining of the fact that he had been denied parole by the parole board:

"Dear Mr. Schiller:

• • •

"Now I should like to bring this to your attention. During your conversations with the U.S. Attorney in discussing my case, while in both our presence, the U.S. Attorney stated, that if I cooperated, which I did, and enter a plea of guilty, which I did, that he the U.S. Attorney would personally write a letter to the parole board recommending that I be given a parole at the earliest parolable date. It is very apparent that this was not done.

"And it was your responsibility as my attorney, and an officer of the Court to see that he kept his promise. • • • And I expect you to see the U.S. Attorney and bring this to his attention, because if one cannot take the word of a gentleman, and man of honor and integrity, then one can believe in nothing."

Mr. Ward was incorrect in his assessment of the prosecutor's reliability. Within a week after the jury returned its verdict he had written the following letter:

RFS:jlw

July 20, 1970

Charles Reid
Chairman of Parole Board
HOLC Building
101 Indiana Avenue
Washington, D. C.

Dear Sir:

Re: *Parole Application of Jessie Ward*

This is to advise you that Jessie Ward recently testified for the government in the successful mail fraud prosecution of Dr. Leslie S. Kaplan, 68 CR 523.

While Jessie Ward was at first quite reluctant to be a government's witness due to the code of the street, he later courageously agreed to do so.

As you know, he was also a co-defendant in the above mail fraud case and pleaded guilty to the charge. After he testified against Dr. Kaplan, he was then sentenced to six months by Judge Robson to run concurrent with his present counterfeiting sentence. Undoubtedly Judge Robson gave him a light concurrent sentence because of his testimony in the Kaplan case.

We would ask you to consider this fact favorably to Mr. Ward in considering his application for parole, as well as the fact that his testimony was of great help to the government's case.

Thank you for your consideration in this matter.

Very truly yours,

William J. Bauer
United States Attorney

These matters, which were brought to the attention of counsel for Dr. Kaplan a few days after the jury's verdict, were brought to the attention of the trial court by a timely motion for a new trial based on newly discovered evidence. (A. 32-7) A hearing followed. Mr. Schiller, Ward's appointed attorney in both the counterfeiting and mail fraud cases, was present at a number of conversations between Ward and several different Assistant U. S. Attorneys. (A. 1061) Schiller testified that at one such meeting, which was held in Mr. Sprague's office after Ward had pleaded guilty but approximately a month or two prior to the commencement of this trial, Ward expressed a reluctance to testify. (A. 1062-3) He said that, if he did, he wanted some help. He was told "to the effect that the Assistant United States Attorney would write a letter to the Parole Board if Jessie Ward cooperated to the effect that Jessie Ward, in fact, did cooperate with the Government, and would appreciate any consideration that the Parole Board would give to Jessie Ward because of his cooperation." (A. 1063)

Richard Sprague, one of the Assistant United States Attorneys, himself admitted that when Ward expressed reluctance to testify because he was afraid of some friends of Dr. Kaplan who were at Sandstone Penitentiary, where he was then serving time, he promised Ward that he would be transferred to another penitentiary if he testified for the government. (A. 1080)

The Court of Appeals found that the prosecutors had made promises to Jessie Ward to compel his testimony, and that they knowingly permitted Jessie Ward to perjure himself in testifying to the contrary.

Reason for Granting the Writ

The United States Court of Appeals for the Seventh Circuit has made the explicit finding that government prosecutors knowingly permitted Jessie Ward, one of Dr. Kaplan's co-defendants in Counts Twelve and Seventeen, to perjure himself in testifying that he had not been promised consideration in exchange for his testimony against Dr. Kaplan. Yet the Court of Appeals reversed Dr. Kaplan's conviction only as to Count Twelve, and left standing his convictions on the remaining substantive counts and the conspiracy count, without inquiring into whether the perjured testimony could have reasonably affected the deliberations of the jury on the other counts. Whether, and under what circumstances, a conviction upon a multi-count indictment may stand where perjured testimony is used to prove less than all the counts, is an issue which has not been decided by this Court.

In *Napue* v. *Illinois*, 360 U.S. 264 (1959) the Court held that a conviction obtained with the aid of false testimony going to the credibility of a witness violated due process of law, and reversed a conviction upon a finding that the false testimony "may have had an effect on the outcome of the trial." *Napue* v. *Illinois*, 360 U.S. 264, 272. In *Giglio* v. *United States*, ... U.S. ....., 92 S.Ct. 763 (1972), the Court said that when a trial is infested with perjured testimony, known by the prosecution to have been false, reversal is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of

the jury." *Giglio* v. *United States*, ... U.S. ....., 92 S. Ct. 763, at 766.[2]

Napue and *Giglio* involved single count indictments, but the applicable test of prejudice can be no different when a finding is made that perjured testimony was knowingly used to obtain a conviction as to less than all the counts of a multi-count indictment. Once the Court of Appeals determined that the government had knowingly permitted Jessie Ward to perjure himself in attempting to prove the allegations of Count Twelve, the Court should have inquired into whether Ward's perjured testimony could, in any reasonable likelihood, have affected the jury's deliberations as to the other counts of the indictment.

---

[2] A number of lower courts have held that the knowing use of perjured testimony by the prosecution requires reversal of a conviction upon a showing of little or no prejudice. See, *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969); *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); *People* v. *Savvides*, 1 N.Y.2d 554, 136 N.E. 2d 853 (1956). In *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966) Chief Justice (then Circuit Judge) Burger, dissenting on other grounds, said, at 294,

> "Presentation of perjured testimony and deliberate suppression of evidence are types of conduct which not only prejudice the defendant but also violate the law, the basic duty of the prosecutor as an officer of the Court, and the very integrity of the judicial process. As a result, a showing that the prosecution knowingly suppressed relevant exculpatory evidence automatically entitles the defendant to a new trial, with little or no showing of prejudice."

See also, Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J., 136, 138-9. Cf. *Mesarosh* v. *United States*, 352 U.S. 1 (1956).

Yet no such inquiry was ever made. Instead the Court of Appeals weighed the evidence on the other counts in a vacuum, ignoring the question of whether the jury took Ward's perjured testimony into consideration in convicting on those counts. In affirming those convictions the Court said,

> "Ward's testimony figured prominently in the accident with which Count Twelve was concerned. Testimony from alleged 'victims' and from other participants in the schemes, in addition to documentary evidence consisting of Kaplan's records of patient visits and medical reports readily sustain his conviction under the remaining substantive counts. The conspiracy count can be sustained on the basis of this evidence in addition to the very damaging testimony of Kaplan's secretary, Addie Frundt, and a co-defendant, one of the lawyers in the scheme, William Kaper." (App. 7)

Thus, rather than focusing on whether the jury's deliberations could have been influenced by the perjured testimony as required by *Napue* and *Giglio,* the Court of Appeals determined only that without regard to Ward's testimony, there was sufficient evidence to sustain the convictions on the other counts. The relevant inquiry, however, was whether the jury could have considered Ward's perjured testimony, and Dr. Kaplan's resultant conviction on Count Twelve, as proof of the allegations of the other counts. The mere fact that the jury's verdict on the other counts was supportable by evidence does not by any means impel the conclusion that they would have convicted if Ward's perjured testimony had not been before them. The Court of Appeals treated this question in a manner directly contrary to relevant holdings of this Court.

Application of the test enunciated in *Napue* and *Giglio* requires reversal of Dr. Kaplan's conviction in its entirety. Quite aside from the specifics of Ward's testimony, it is inevitable that a jury's deliberations upon a

multi-count indictment, each count of which arises from a single scheme to defraud, will be influenced by a finding of guilty as to one count. This was particularly so here, where Dr. Kaplan's defense to the allegations of fraud was an absence of fraudulent intent.

Moreover Jessie Ward was a major prosecution witness whose testimony exceeded the bounds of Count Twelve. The prosecution itself emphasized Ward's testimony in closing argument, brazenly pointing to him as a disinterested witness whose testimony was therefore deserving of particular credence. Ward testified to a relationship existing between Dr. Kaplan and Whit Johnson, an ambulance chaser who was one of the central figures in the scheme to defraud. Ward said that after he, Johnson and one Joe Beckom agreed to the fraud described in Count Twelve, Johnson took him and Beckom to Dr. Kaplan's office. He said that Johnson was friendly and familiar with Dr. Kaplan's staff, and had free entree to Dr. Kaplan's private office. Ward also testified to a relationship between Dr. Kaplan and Joe Beckom, who was named with Dr. Kaplan in several counts of the indictment in addition to Count Twelve. In fact, Whit Johnson and Beckom were named either singly or together in every count in which Dr. Kaplan was named.

More significantly, Ward was the only accident victim treated by Dr. Kaplan to testify to knowing acts of fraud on his part. Ward said that Dr. Kaplan knew that he and Beckom were not injured when he examined them, and that he knowingly falsified their medical bills and reports for submission to insurance companies. Ward, in fact, said that Dr. Kaplan asked him how many visits he wanted the bill to reflect. Since Dr. Kaplan's defense to the charges against him was that the medical bills and reports were prepared in good faith, and accurately reflected his diag-

nosis and treatments, Ward's testimony was highly damaging. Once the jury believed that Dr. Kaplan knowingly fabricated bills and reports for Ward and Beckom, Dr. Kaplan was literally stripped of his good faith defense to the other counts.

No other co-defendant, and no other alleged participant in any of the count accidents, testified to affirmative, knowing acts of misconduct on the part of Dr. Kaplan. Certainly Ward's testimony of Dr. Kaplan's knowing complicity in the scheme was a determinative factor in his convictions on the substantive counts of the indictment, and in the jury's determination that he was guilty as charged in the conspiracy count.

This Court has spoken eloquently of its concern for the integrity of federal criminal trials. In *Mesarosh* v. *United States,* 352 U.S. 1 (1956), the Court said,

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony.
>
> * * *
>
> This is a federal criminal case and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has any duty to perform in this regard, it has to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> 'The untainted administration of justice is one of the most cherished aspects of our institutions.' " *Mesarosh* v. *United States,* 352 U.S. 1, at 9, 14.

Here an instance of blatant prosecutorial misconduct is spread on the face of the record. Assistant United States Attorneys not only knowingly permitted a government witness to perjure himself, but actively solicited false testimony on redirect examination of the witness,

and argued to the jury that the perjured testimony deserved to be given particular weight. Yet Dr. Kaplan's conviction remains undisturbed for all practical purposes, a stain on the ledger of the law. Justice was more than merely polluted here. Fine calculations of potential prejudice aside, we ask this Court to consider whether it can permit such a conviction to stand in the face of such unprofessional conduct by government prosecutors.

Conclusion

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the the Seventh Circuit entered in this case.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 18863

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LESLIE S. KAPLAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 68 CR 523 — Edwin A. Robson, Judge

ARGUED MAY 18, 1972 — DECIDED SEPTEMBER 8, 1972

Before SWYGERT, *Chief Judge*, PELL, *Circuit Judge*, and GORDON, *District Judge*.*

SWYGERT, *Chief Judge*. The defendant, Doctor Leslie S. Kaplan, appeals from his conviction of five counts of mail fraud (18 U.S.C. § 1341) and one count of conspiracy (18 U.S.C. § 371). The convictions stemmed from a scheme to defraud several insurance companies in which Kap-

* District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

lan and ten other defendants allegedly participated. The scheme including planning "fake automobile and pedestrian accidents," recruiting participants in the fake accidents and additional participants in legitimate accidents, arranging that lawyers be retained to prosecute the claims against the insurance companies, requiring that all participants visit the offices of Kaplan and, causing fraudulent medical reports to be prepared and sent to the insurance companies. Kaplan's trial, which was severed from that of his codefendants, resulted in convictions on all counts in which he was named. He was sentenced to the custody of the Attorney General for concurrent sentences of three years on each count and fined a total of $15,000. In this appeal, four issues are raised: that the prosecution failed to disclose that a fact, critical for impeachment purposes, was misrepresented by one of its witnesses, that the trial judge erred in refusing to order a bill of particulars, that the prosecution's cross-examinations of a defense character witness and of the defendant were improper, and that the evidence was insufficient to sustain a conviction on all counts.

We find the first claim—that the Government failed to disclose a crucial misrepresentation made by one of its witnesses—the most substantial. The testimony of Jesse Ward was used to establish Kaplan's participation in the set of incidents on which Count Twelve was based. Ward, himself a defendant in this case, was at the time of the trial incarcerated in Sandstone Penitentiary for conviction of counterfeiting. On cross-examination, Ward was repeatedly asked if he had been promised anything in return for his testimony. On one occasion he said that Howard Hoffman, an Assistant United States Attorney assigned to this case, "never, never, never" told him that he would remind the court that Ward had been a Government witness when he came up for sentencing in the mail fraud case. On another occasion, he denied ever having

spoken with Hoffman or any other prosecutor saying, "I don't want to talk to Mr. Potter or Mr. Hoffman, none of them. . . . I don't want to see them people. . . . They're the ones that got me behind them [the prison bars]. Why should I want to come talk to him? I just want to admit my crime and go back to the street to my friends." Finally, the prosecutor pointedly asked on redirect: "Mr. Ward, at any of the few times that you and I have talked together, did I or Mr. Sprague or Mr. Potter ever make any promise of any kind to you regarding anything?" Ward then reiterated: "You people keep asking me that. I told you ain't nobody never offered me nothing, and I would like to say you made no offers, you never told me you could do anything for me. The only thing you ever told me, did I want to tell you anything about the case, and whatever I said could be used against me. . . ."

After Kaplan was convicted, a letter written by Ward to his court-appointed attorney came to the attention of Kaplan's attorney. In the letter, Ward alluded to promises he had received in exchange for his cooperation and complained that they had not been fulfilled because the United States Attorney had not "personally" written a letter to the Parole Board "recommending that I be given a parole at the earliest parolable date." Defense counsel immediately moved for a new trial on the grounds of newly discovered evidence.[1]

---

[1] The letter stated in pertinent part:

Dear Mr. Schiller:

* * *

Now I should like to bring this to your attention. During your conversations with the U. S. Attorney in discussing my case, while in both our presence, the U. S. Attorney stated, that if I cooperated, which I did, and enter a plea of guilty, which I did, that he the U. S. Attorney would personally write a letter to the parole board recommending that I be given a

At a subsequent hearing, the Government revealed a letter written by the United States Attorney to the Parole Board immediately following the conclusion of the Kaplan trial. The United States Attorney reminded the Parole Board that Ward, after having been "quite reluctant to be a government's witness due to the code of the street," later "courageously agreed to do so," and urged the Board to "consider this fact favorably to Mr. Ward in considering his application for parole, as well as the fact that his testimony was of great help to the government's case."[2] The hearing established that Ward had been

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(footnote continued)

parole at the earliest parolable date. It is very apparent that this was not done.

And it was your responsibility as my attorney, and an officer of the Court to see that he kept his promise. * * And I expect you to see the U. S. Attorney and bring this to his attention, because if one cannot take the word of a gentleman, and man of honor and integrity, then one can believe in nothing.

[2] The letter read as follows:

Dear Sir:

Re: Parole Application of Jesse Ward

This is to advise you that Jesse Ward recently testified for the government in the successful mail fraud prosecution of Dr. Leslie S. Kaplan, 68 CR 523.

While Jesse Ward was at first quite reluctant to be a government's witness due to the code of the street, he later courageously agreed to do so.

As you know, he was also a co-defendant in the above mail fraud case and pleaded guilty to the charge. After he testified against Dr. Kaplan, he was then sentenced to six months by Judge Robson to run concurrent with his present counterfeiting sentence. Undoubtedly Judge Robson gave him a light concurrent sentence because of his testimony in the Kaplan case.

We would ask you to consider this fact favorably to Mr. Ward in considering his application for parole, as well as the fact that his testimony was of great help to the government's case.

Thank you for your consideration in this matter.

reluctant to testify, that he had tried to elicit an agreement to secure his release on parole in the counterfeiting case or to influence his prospective sentencing in the mail fraud case, and that finally, at one meeting in Assistant United States Attorney Sprague's office, Sprague accepted Ward's request to write a letter to the Parole Board "to the effect that Jessie Ward, in fact, did cooperate with the Government and would appreciate any consideration that the Parole Board would give to Jessie Ward because of his cooperation." The district court found that there had been a "misstatement" in Ward's testimony, but held that it had not affected the outcome of the case. The court consequently denied the motion for a new trial.

The Government states that Ward had not received "any consideration," that "no promise" was made to Ward for his testimony. We find the Government's argument an exercise in sophistry. It suggests that Ward was not promised anything in exchange for his testimony simply because he had been disappointed in his initial requests; in the Government's calculation, receiving less than he had asked for as a result of these meetings amounts to receiving nothing.

Ward was a three time felon. He had been previously convicted of a Dyer Act violation in July 1959; he was then serving time for counterfeiting, and had pled guilty to one count of mail fraud and conspiracy in the instant case. A letter written by the United States Attorney pointing out what "great help" he had been to the Government's case was no unimportant gesture. Though Ward had wanted more assurances from the Government—in effect a guarantee that he would be released—this promise was sufficient to finally prod him into testifying. His statements denying ever having met with any prosecutor

on these subjects were undeniably fallacious. The statement, "nobody never offered me nothing," is a misrepresentation, if not an overt perjury.

The scope of our review is ordinarily limited when the issue before us is couched in a motion for a new trial based on newly discovered evidence. *United States* v. *Johnson*, 327 U.S. 106, 111-12 (1946). However, an exception has been carved out when the new evidence suggests that material facts known to the prosecutor during the pendency of the trial have not been disclosed to the defense. This is especially so when the prosecutor is charged with knowingly using perjured testimony, *Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957), *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942), *Mooney* v. *Holonhan*, 294 U.S. 103, 112 (1935), or with failing to correct testimony when it became apparent that it was false, *Napue* v. *Illinois*, 360 U.S. 264 (1959).

In *Napue*, the principal state witness, in response to a question from the Assistant State's Attorney, stated that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney allowed this statement to come before the jury uncontradicted. After the trial, defendant's counsel discovered that the Assistant State's Attorney had promised that "a recommendation for a reduction of his [the witness'] sentence would be made, and, if possible, effectuated." The Court grounded its analysis in the due process clause of the Constitution and interpreted its requirements strictly. It held that where the prosecutor's responsibility to insure a fair trial is concerned there is no difference between false substantive evidence and false impeachment evidence: "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted

conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." 360 U.S. at 269. In addition, it found that the constitutional infirmity was not eliminated because other impeachment evidence had been introduced against this witness. 360 U.S. at 270.

Since we have characterized Ward's testimony as false, we find that this case fits squarely within the rule of *Napue*. We reject the Government's claim that additional impeachment evidence introduced against Ward, in particular, evidence of his prior convictions, served to eliminate the constitutional error. Moreover, given the strict standards advanced for reviewing prosecutorial misconduct of this type, we find that since Ward's testimony may have affected Kaplan's conviction on Count Twelve, a new trial of that charge is required.

The defendant also urges that this court find his conviction under all counts "tainted" by Ward's testimony. Upon careful review of the evidence, we have found otherwise. Each substantive count of the indictment described a separate falsified accident and the mailings employed in connection with it. Ward's testimony figured prominently in the accident with which Count Twelve was concerned. Testimony from alleged "victims" of the accidents, from the lawyers retained by the victims, and from other participants in the schemes, in addition to documentary evidence consisting of Kaplan's records of patients' visits and medical reports readily sustain his conviction under the remaining substantive counts. The conspiracy count can be sustained on the basis of this evidence in addition to the very damaging testimony of Kaplan's secretary, Addie Frundt, and a codefendant, one of the lawyers in the scheme, William Kaper.

The defendant charges error in the court's failure to grant him a bill of particulars. The Government responds with the oft-quoted rule, that the motion for a bill of particulars is "addressed to the sound discretion of the trial court." *Wong Tai* v. *United States,* 273 U.S. 77, 82 (1927). We think it important that this rule not serve as a shield to all appellate review of bill of particulars' claims. Though the scope of our review is limited to a finding of an abuse of discretion, that exercise is an important one. The standards for review derive from the two functions of a bill of particulars, the "apprising" requirement of the sixth amendment, and the double jeopardy protection of the fifth amendment, 8 J. Moore, Federal Practice ¶ 7.06[1], at 7-32 (1972). Only the former is claimed to be unsatisfied in the instant case.

The information requested by the defense counsel was undeniably important to the preparation of the defense. The crucial question, however, is whether it was necessary that the Government supply that information. We must consider whether the defense could have obtained the information through an ordinary investigation or whether the costs of that investigation would have been prohibitive. After careful analysis of the indictment, we find that the information requested was well within the scope of a defense counsel's usual investigation. It seems unlikely that the defense would suffer unduly as a result of this expenditure of time or money.

III

The defendant also charges error in the conduct of the trial. He claims that the trial judge erred in permitting impeachment of a defense character witness through questions dealing with a previous suspension of the defendant by the Cook County Medical Association because of defen-

dant's treatment and billing of welfare patients. We fully understand the damages involved in the impeachment of character witnesses and the important responsibilities of trial judges in this regard. *Shimon* v. *United States*, 352 F.2d 449 (7th Cir. 1965); *see also* 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940). Questions which seek to challenge the scope and basis of the witness' knowledge run the risk of revealing to the jury the specific acts of misconduct performed by the defendant, evidence which would be otherwise inadmissible. This is especially so where, as in *Shimon*, the impeachment questions involved offenses similar to the one before the jury in the case at bar. However, in *Shimon*, the court suggested that the risks of impeachment could be obviated in some circumstances by permitting the witness to testify about what he has heard as to the outcome of the charges. In the instant case, we find that the prejudicial effect of the Government's cross-examination was neutralized by the testimony of the witness in response to the defense counsel's questions on redirect. The witness stated that Kaplan had since been reinstated by the Cook County Medical Association. *Shimon* v. *United States*, *supra* at 454.[3]

[3] The defendant also argues that cautionary instructions are mandatory in cases of this kind. Basing his argument on *United States* v. *Phillips*, 217 F.2d 435 (7th Cir. 1955), the defendant claims that failure to provide these instructions amounts to plain error and warrants reversal of the case. However, the facts of *Phillips* are in many respects *sui generis*: The Government fired questions at the witness relating to arrests of the defendant of which the witness claimed to be ignorant. There was no basis in the record for these charges, the judge took no steps to ascertain, out of the presence of the jury, whether these questions were grounded in actual events, and no cautionary instructions were then given. The defense counsel objected and the court summarily overruled his objections. In the

Finally, we find no merit in Kaplan's claim that the questions asked by the Government during his cross-examination justify reversal of his conviction or that the evidence was insufficient to sustain the jury's finding. We thus affirm Kaplan's conviction on all counts with the sole exception of Count Twelve.[4]

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

(footnote continued)
instant case, immediately after direct examination of the witness was concluded, the Government informed the court, out of the presence of the jury, that it intended to inquire about the recommendations of the Cook County Medical Advisory Committee suspending defendant from practice in 1955 and 1968. Counsel for defendant then moved to strike the witness' testimony. The court denied the defendant's motion but decided to limit cross-examination to the 1955 suspension since the 1968 suspension may have been prompted by the current charges. The court had taken precautionary steps and had uncovered a basis in fact for the questions. Moreover, as we have indicated above, the court permitted the witness to testify about the defendant's subsequent reinstatement. While the better practice may be to give cautionary instructions, we cannot say that under these circumstances the court's failure to do so requires reversal.

[4] Since counts under concurrent sentences are involved here, we are bound, under *United States* v. *Tanner,* ..... F.2d ..... (7th Cir. 1972), to consider whether the declaration of one count of the indictment invalid requires resentencing of the others. After considering the factors advanced in *Tanner,* we have decided that reversal of Count Twelve is sufficient.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 8, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

No. 18863

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LESLIE S. KAPLAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED on all Counts with the sole exception of Count Twelve, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

November 24, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

No. 18863

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LESLIE S. KAPLAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(68 CR 523)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby *denied.*

APPENDIX D

18 U.S.C., Section 1341 provides:

§1341. *Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

18 U.S.C., Section 371 provides:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.